

5 September 1974

CIA Interests Re NSSM 229

1. Perhaps the fundamental point is that we must be clear that there is a distinction between classification authority under Executive Order 11652 and the statutory responsibility of the Director to protect intelligence sources and methods. Many items of information would be subject to protection under both of these sources of authority. Information classified pursuant to an Executive order is exempt from the disclosure requirements of the Freedom of Information Act. So is information which is "specifically exempt from disclosure by statute." The statute which charges the Director with responsibility for the protection of sources and methods may be a statute which specifically exempts, within the meaning of the Freedom of Information Act, and the Agency so regards it. But this is by no means certain. The issue has never been litigated, but almost certainly will be in one or more of the upcoming Freedom of Information law-suits. In view of the uncertainty in this area and because the question could be decided against us by the courts, it is important that CIA and the Scowcroft group in no way disregard or minimize the need for Executive order protection of information.

2. Perhaps the second most important item for CIA and Scowcroft consideration is the matter of costs, burdens and dangers of the Freedom of Information Act. As to dangers, my thought is that the extreme provisions of the Act (tight deadlines, unrestricted right of everyone to request anything, and the "reasonably segregable portions" provision), together with the difficulties of persuading judges while protecting information, and considering the heavy volume of documents with which the Agency and the intelligence community is concerned, are such that over a period of time it will become virtually impossible for the Agency to protect information. This would mean it would be virtually impossible to perform our functions.

3. It would seem to me unlikely that executive branch actions, including the work of the Scowcroft group, are going to deflect or forestall congressional action towards a statutory classification system. It would follow that we should not accept or support existing provisions or concepts in Executive Order 11652 merely because there has been some congressional satisfaction with them. For example, what is the value to the agencies or to anyone in the quarterly reports which the agencies must submit to ICRC? Has the existence of ICRC enhanced security?

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4. Also relating to the foregoing, is ICRC conceptually sound? Is it appropriate to authorize a body of representatives of the various agencies to override the decisions of any of those agencies or of any other executive branch agencies, including decisions made by agency heads, and to supervise the activities of those agencies? It seems certain that ICRC can perform this function only by developing a larger staff and by meeting more often. Is it possible and is it economically feasible to create an ICRC with a sufficiently large and sufficiently expert staff to perform duties essentially duplicative of those performed by the departments involved? The basic issue involved in our recent concern with the availability of certain CIA documents for ICRC review in the Bunnell appeal was the fact that ICRC has review and veto authority.

5. I wonder if the concept of automatic declassification and the right of any individual to have any ten-year old document reviewed for declassification, both now embodied in the Executive order, are realistic concepts as applied to an intelligence agency. Since CIA exempts from automatic declassification nearly 100 percent of its documents, should we not be entirely exempt from the automatic declassification provision?

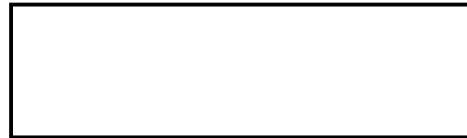
6. Should USIB be brought into the study called for by NSSM 229 and, if so, how should it be done? Should USIB study the questions posed by the NSSM and submit USIB input via the CIA representative to the Scowcroft group? Should CIA take the lead in proposing to USIB agencies that those agencies undertake to make certain that their views are made known to the Scowcroft group through channels available to the USIB agencies?

7. The NSSM does not mention the National Security Council Directive of 17 May 1972 which implements Executive Order 11652. Notwithstanding that, I believe the Agency should examine the adequacy of that document also, since it is in effect merely an extension and expansion of the scope of the order.

8. The Agency should be alert to the fact that some weeks ago a proposal for an amendment to the Executive order was initiated essentially by the Freedom of Information Committee of the Department of Justice and ICRC which would give ICRC considerable review authority with respect to classified documents involved in FOI litigation. This proposal was opposed, largely under the leadership of CIA and Mr. Warner, in particular, and is substantially dead. But its advocates almost certainly will view the forthcoming study as the vehicle to revive and push the proposal.

9. Numerous problems and difficulties exist in various provisions of the Executive order which could and should be addressed on this occasion. The matter of so-called "derivative" classification authority is one. The language of the exemptions which permit appropriate officials to exempt from automatic declassification and which are the standards to be applied on the occasion of declassification review seems questionable at best. Should not a declassification review address itself solely to the question of whether disclosure would damage national security? Exemption (4) under the Executive order concerns information the disclosure of which would place a person in "immediate jeopardy." What kind of jeopardy is intended? Is it physical safety? Job security? Is the document to be declassified if the jeopardy is not "immediate?" We should feel free to propose revision of any features or language of the order and the NSC Directive.

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